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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 71-1456

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SALYER LAND COMPANY, a California corporation,  
C. EVERETTE SALYER; FRED SALYER; LAWRENCE  
ELLISON; and HAROLD SHAWL,

*Appellants,*

VS.

TULARE LAKE BASIN WATER STORAGE DISTRICT, a  
public district,

*Appellee.*

---

On Appeal from the United States District Court for  
the Eastern District of California

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**REPLY BRIEF FOR THE APPELLANTS**

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**OPINIONS BELOW**

The opinions of the Court below, which had not been reported when the opening briefs were prepared, have now been published. 342 F.Supp. 144 (E.D. Cal. 1972).

**ARGUMENT**

With the filing of the defendant district's brief and the supporting briefs of the amici curiae, this case is now ready to be summed up. The singular system which obtains in Tulare Lake Basin Water Storage

District, with the statutes bluntly providing that "Only the holders of title to land are entitled to vote at a general election",<sup>1</sup> and "Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars (\$100) ... worth of his land....",<sup>2</sup> has been the subject of some singular defenses.

**1. The argument that the District has no governmental powers**

The brief of the defendant district puts it like this:

"The directors of a California water storage district ... exercise virtually no governmental power whatsoever."<sup>3</sup>

The *amicus curiae* Irrigation District's Association of California is not in complete agreement:

"Its [the district's] jurisdiction and its exercise of governmental power concerns only the land within its boundaries, and the owners of that land wherever they might reside."<sup>4</sup>

The *amicus curiae* California Central Valleys Flood Control Association puts its view quite baldly:

"The Appellee District was formed for the purpose of serving property not people; it in fact serves property not the people."<sup>5</sup>

The first difficulty with these positions springs from authority. The California courts view these districts

<sup>1</sup> Calif. Water Code, § 41000.

<sup>2</sup> Calif. Water Code, § 41001.

<sup>3</sup> District's brief, p. 13.

<sup>4</sup> Brief of Irrigation Districts Valleys Association of California, p. 30.

<sup>5</sup> Brief of California Central Valleys Flood Control Association, p. 7.



as entirely governmental both in structure and function. The leading case is *Glenn-Colusa Irrigation District v. Ohrt*:<sup>\*</sup>

"State agencies such as irrigation or reclamation districts \* \* \* are agencies of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense."

The *Glenn-Colusa* case was cited in both the jurisdictional statement and opening brief; neither the defendant district nor either of the amici curiae have seen fit to make reference to it.

The Attorney General of California on February 20, 1969 rendered an opinion to the California Districts Securities Commission on the governmental nature of water storage districts, in a matter which concerned the defendant district itself:

"This is in answer to your request for our opinion on the status of the Tulare Lake Basin Water Storage District as a 'political subdivision' of the State of California. I have concluded that water storage districts are considered political subdivisions of the State.

<sup>\*</sup> 31 Cal. App. 2d 619, 88 P.2d 763 (1939).

<sup>†</sup> 88 P.2d at 765. [Emphases added throughout this brief] Calif. Water Code § 39060 is as follows: "The [water storage] districts formed pursuant to this division are districts of the nature of irrigation, reclamation, or drainage districts in respect to all matters contemplated in the provisions of the constitution of the State of California relating to irrigation, reclamation, or drainage". Defendant district has conceded that water storage districts and irrigation districts "are virtually identical in all respects relevant to this case". Reply memorandum filed September 30, 1970, page 8.

"The California Water Storage District Law includes a section titled 'Nature of Districts Formed Under This Division.' This is Water Code section 39060 which provides as follows:

'The districts formed pursuant to this division are districts of the nature of irrigation, reclamation, or drainage districts in respect to all matters contemplated in the provisions of the constitution of the State of California relating to irrigation, reclamation, or drainage.'

"Thus the conclusions reached as to the nature of irrigation districts would also apply to water storage districts, and it is well settled that irrigation districts are considered political subdivisions and agencies of the State. See *Glenn-Colusa Irrigation District v. Ohrt*, 31, Cal.App.2d 619, 621 (1939) and cases cited therein."

This opinion of the Attorney General of California was also referred to in both the opening brief and jurisdictional statement. The briefs of the defendant district and of the amici curiae will be searched in vain for any reference to it.

To turn from authority to considerations of what the district actually does, the record reveals that it has successfully claimed the standing of *parens patriae*<sup>9</sup> to represent the interest of Tulare Lake Basin in litigation.

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<sup>9</sup> The opinion is set forth in full beginning on page 17 of the Appendix. It is also treated on page 61 of the Appendix.

<sup>9</sup> The concept of *parens patriae* is certainly governmental; Mr. Justice Holmes speaks of it in *Georgia v. Tennessee Copper Company*, 206 U.S. 230, 237 (1907) as "quasi-sovereign", an expression quoted by Mr. Justice Douglas in his discussion of *parens patriae* in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945).



tion filed by the United States in the very Federal Court from which the present appeal has been taken:

"On October 4, 1965 Tulare Lake Basin Water Storage District filed a motion for leave to intervene in the case of *United States v. Tulare Lake Canal Company*, No. ND 1483, the litigation to determine applicability of the acreage restrictions of federal reclamation law to the lands in the Kings River service area. In its papers for such intervention, Tulare Lake Basin Water Storage District stated in part as follows:

'It would appear appropriate that Tulare Lake Basin Water Storage District, as the public agency most clearly concerned with the water rights of Tulare Lake Basin, be granted leave to intervene, in the nature of the right of *parens patriae*, to speak for and assert the interest of Tulare Lake Basin.'

"The motion for leave to intervene was granted by this Court<sup>10</sup> by order date January 27, 1966, and the district has participated in the litigation, which was recently tried, since that period."<sup>11</sup>

The governmental nature of the district is well demonstrated by Sec. 43158 of the Water Code:

"All waters and water rights belonging to this State within the district are given, dedicated, and set apart for the uses and purposes of the district."<sup>12</sup>

<sup>10</sup> That is, the United States District Court for the Eastern District of California.

<sup>11</sup> Appendix, pages 52-53.

<sup>12</sup> The philosophy of Water Code § 43157 is of similar tenor: "The right of way is hereby given, dedicated, and set apart for the location, construction, and maintenance of works [of water storage districts] over and through any land which is or may be the property of this State."

Still further evidence of the district's governmental character is demonstrated by its having received \$234,512.24 in federal funds as a disaster relief grant, following the 1969 flood.<sup>13</sup>

The directors of the district are "public officers of the state"<sup>14</sup> who must take an official oath and execute a bond.<sup>15</sup> The district possesses and exercises the power of eminent domain.<sup>16</sup> The district's works may not be taxed<sup>17</sup>, it is covered by the special statutory scheme concerning governmental immunity<sup>18</sup>, and common with other California governmental bodies, it may obtain judicial validation of its acts.<sup>19</sup> The district "may cooperate and contract with the state... or the United States":

"The cooperation and contract may be for any or all of the following purposes:

(a) Construction, acquisition, purchase, extension, operation, or maintenance of works for irrigation, drainage, storage, flood control, generation and distribution of hydroelectric energy incidental thereto, or any of these.

(b) A water supply.

(c) Assumption as principal or guarantor of indebtedness to the state, the department, any other district, or the United States.

<sup>13</sup> Appendix, p. 61.

<sup>14</sup> *Re Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272 (1891).

<sup>15</sup> Calif. Water Code, § 40301.

<sup>16</sup> Calif. Water Code, § 43530.

<sup>17</sup> Calif. Water Code, § 43508.

<sup>18</sup> Calif. Government Code, § 811.2.

<sup>19</sup> Calif. Code of Civil Procedure, § 860 ff.; Calif. Water Code § 43730.

(d) To carry out the terms of any contract between the district and the state, the department, any other district, or the United States."<sup>20</sup>

The district's flood control powers, touched on in Water Code Sec. 44001 above quoted, will be discussed at greater length in another section of this brief.<sup>21</sup> As stated in the opening brief, the district may issue bonds secured by assessments,<sup>22</sup> may provide tolls and charges for the use of water, irrigation and power,<sup>23</sup> and may sell surplus water and power.<sup>24</sup>

Finally the California statutes are specific that the properties of the district and its waters are devoted to public use:

"The use of all water required for the irrigation of land and for domestic and other incidental and beneficial uses within the district, together with the rights of way for canals and ditches, sites for reservoirs and all other property required in fully carrying out the provisions of this division is a public use, subject to the regulation and control of the State in the manner prescribed by law."<sup>25</sup>

The suggestion was made in the opening brief that the issue of the governmental nature of the district may be concluded. This is an unusual procedural situation, in that only a portion of the judgment of the Court

<sup>20</sup> Calif. Water Code, § 44001.

<sup>21</sup> See page 20, *infra*.

<sup>22</sup> Calif. Water Code, § 45100 ff.

<sup>23</sup> Calif. Water Code, § 43006 ff.

<sup>24</sup> Calif. Water Code, §§ 43507, 43001, & 43026.

<sup>25</sup> Calif. Water Code, § 39061.

below has been appealed. The Court was unanimous in finding the district to be malapportioned:

"The present divisions have not been redivisioned for 40 years. Total assessed valuation of the land in Division 4 is nearly three times greater than the total assessed valuation of Division 10 (Division 4—\$1,954,547; Division 10—\$688,425). The result is that \$100 of assessed valuation in Division 10 has almost three times the voting power of \$100 of assessed valuation in Division 4. In addition, Division 4 has 110 separate landowners, whereas Division 10 has only 4. Each Division is entitled to one director on the District's Board of Directors. Consequently, the 110 landowners in Division 4 have only one-third the representation on the Board when compared to Division 10.

"Such malapportionment present a classic violation of equal protection and therefore defendant is ordered to submit a plan to correct this malapportionment within six months of the date this decision becomes final."<sup>28</sup>

Judge Browning concurred in this finding:

"Each division elects one director, but the number of landowners in the divisions varies from 110 in division four to four in division ten. While the record does not show the number of lessees in each division, there is no reason to believe that the gross malapportionment among the divisions will be corrected merely by including lessees among those qualified to vote.

"Such malapportionment does indeed present a classic violation of equal protection. *See Reynolds v. Sims*, 377 U.S. 533, 562-63 & n.40 (1964). As Mr. Justice Black said in *Hadley, supra*, after finding that important governmental functions

<sup>28</sup> Appendix, pp. 106, 107.

*were involved having sufficient impact throughout the constituency, 'when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal number of voters can vote for proportionally equal numbers of officials.'* 397 U.S. at 56."<sup>27</sup>

The point, then, is that this district has been ordered to reapportion itself. The Court below was unanimous, and no appeal has been taken. The notice of appeal filed by these appellants was expressly limited to "that part of the judgment entered March 10, 1972 which denies an injunction restraining the enforcement, operation and execution of Sections 41000 and 41001 of the California Water Storage District Law." But it was a necessary predicate of the reapportionment order that there have been governmental functions "involved, having sufficient impact throughout the constituency," sufficient to justify the court's intercession. *Hadley v. Junior College District*,<sup>28</sup>; *Avery v. Midland County, Texas*<sup>29</sup>.

Whether the district should have been reapportioned was one of the issues litigated below. The district resisted reapportionment, on a variety of fronts, among others that "the board exercises practically no governmental [powers] at all."<sup>30</sup> The Court determined the issue of apportionment against the district, and no appeal having been taken from that portion of the judgment, it can be strongly argued that the gov-

<sup>27</sup> Appendix, pp. 118, 119.

<sup>28</sup> 397 U.S. 50 (1970).

<sup>29</sup> 390 U.S. 474 (1968).

<sup>30</sup> Defendant's Opening Brief Following Submission of Factual Statements, July 23, 1971, p. 12.



ernmental nature of the district has been adjudicated and is now the law of the case.<sup>31</sup> The suggestion was made in the opening brief.<sup>32</sup> The briefs of the district and of the amici curiae have attempted no reply of any kind.

**2. The argument that districts will not be formed unless weighted voting is retained**

"By the same token, this voting procedure recognizes that, since these projects are for the benefit of the lands in the District and will be paid for by each landowner in proportion to the value of his land, it is essential that a majority in value agree that a project should be adopted. Otherwise, the large landowners could not be induced to join in the formation of a water storage district. Stated differently, it would be rather absurd to assume that the J. G. Boswell Company would be willing to participate in the affairs of the Tulare Lake Basin Water Storage District if Thomas J. Amos and 188 of his friends could at their whim visit a \$817,685.00 assessment upon that Company."<sup>33</sup>

This is unimpressive. Irrigation districts are more commonly seen in California than water storage districts; the two are substantially the same.<sup>34</sup> But in irrigation districts only residents have the vote, and it is of course an equal one; landowners do not vote at all unless they be resident. This has not prevented the

<sup>31</sup> See the discussion in 1B Moore's Federal Practice, beginning at p. 401.

<sup>32</sup> Appellant's Opening Brief, pp. 25, 26.

<sup>33</sup> District's Brief, p. 25.

<sup>34</sup> The appellee district has conceded that water storage districts and irrigation districts "are virtually identical in all respects relevant to this case." Reply Memorandum filed September 30, 1970, p. 8.



formation of large numbers of irrigation districts. In fact, the Court will note that they so predominate that the amicus curiae representing water organizations in California bears the name "Irrigations Districts Association of California."

A new project in a water storage district cannot be undertaken at anyone's "whim". The procedure is lengthy.<sup>25</sup> The project must be approved by the State Treasurer, who may request a report from the Department of Water Resources as to its engineering feasibility.<sup>26</sup>

The district argues that "189 landowners representing 2.34 percent of the acreage in the District represent an absolute majority of the landowners."<sup>27</sup> The suggestion is that it would be distressing for 2.34 percent of the acreage to control the district, even though a majority in number.

A table in Exhibit Q<sup>28</sup> analyzes the landholdings in the District. There are 119 owners of up to 20 acres, 37 with holdings between 21 and 40 acres, and 33 who own between 41 and 80 acres. Put another way, there are 189 landowners who own up to 80 acres each. At the other end of the scale the J. G. Boswell Company owns 61,666 acres. The issue as to how the franchise shall be distributed among the wealthy and non-wealthy is an ancient one; in this country one had thought it to have been long decided. This Court stated in *Gray v. Sanders*,<sup>29</sup> "... [O]nce the class of voters is chosen

<sup>25</sup> Calif. Water Code, § § 42200-42752.

<sup>26</sup> Calif. Water Code, § 42500.

<sup>27</sup> District's Brief, p. 24.

<sup>28</sup> Following page 88 of Appendix.

<sup>29</sup> 372 U.S. 368, 381 (1963).

and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."<sup>40</sup>

As was said in *Stewart v. Parrish School Board*,<sup>41</sup>

"In terms of voting responsibly, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another."<sup>42</sup>

The fact that *Stewart* was affirmed by this Court with only Mr. Justice Harlan of opinion that probable jurisdiction should have been noted,<sup>43</sup> was discussed in appellants' opening brief. The district and both amici curiae have chosen to ignore the case; there is no mention of it in any of their briefs. *Stewart* was cited by the Chief Justice in his opinion in *Gordon v. Lance*:<sup>44</sup>

"While Cipriano involved a denial of the vote, a *percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective*. See *Stewart v. Parish School Board*, 310 F.Supp. 1172 (E.D. La.) aff'd, 400 U.S. 884 (1970)."<sup>45</sup>

This statement of the Chief Justice was set forth in the appellants' opening brief. There has been no attempt

<sup>40</sup> This statement is quoted with approval by Mr. Justice Black in *Hadley v. Junior College District*, 397 U.S. 50, 59 (1970).

<sup>41</sup> 310 F.Supp. 1172 (1970) (E.D. La. 1970), affirmed, 400 U.S. 884 (1970).

<sup>42</sup> 310 F.Supp. at 1179.

<sup>43</sup> 400 U.S. at 884.

<sup>44</sup> 403 U.S. 1 (1971).

<sup>45</sup> 403 U.S. at 4. This statement is quoted as "particularly pertinent" in the recent case of *Curtis v. Board of Supervisors*, 7 Cal.3d 942, 958 (1972).

to distinguish it, or any reference to it at all, in the briefs filed by the district and the amici curiae.

It could be that persons holding only 2.34 percent of the wealth of the United States are in a numerical majority. Tulare Lake Basin Water Storage District presents the problem in microcosm. The district's argument proves too much. If we follow it, the franchise generally should be restricted to those with property. On such a basis Mr. Howard Hughes would presumably be entitled to millions of votes. But as this Court stated in *Harper v. Virginia State Board of Elections*,<sup>46</sup> Voter qualifications have no relation to wealth. . . ."<sup>47</sup>

**3. The argument that the board's functions are limited to projects**

"The duties of the board of directors are carefully stated by the California legislature. Specifically, the board's functions are limited to examining proposed projects, estimating costs, and reporting thereon."<sup>48</sup>

For this statement the district cites Section 42200<sup>49</sup> of the California Water Code, which details the duties

<sup>46</sup> 383 U.S. 663 (1966).

<sup>47</sup> 383 U.S. at 666.

<sup>48</sup> District's brief, page 7.

<sup>49</sup> "Upon the organization of a district, the board shall make or cause to be made all examinations, surveys, plans and specifications, and estimates of costs for the acquisition, appropriation, diversion, storage, conservation, and distribution of water, any drainage or reclamation works connected therewith, and the generation of hydroelectric energy incident thereto, and the sale and distribution thereof, as may be necessary or requisite to enable the board to ascertain and estimate the requirements and works necessary for the purpose of the district, and the probable cost and to make a report."

of the board of directors with reference to projects, and comes under the heading, "District Project." To say that the board has no other powers than those given by Section 42200 is quite inaccurate. The most important statute on the powers of the board of directors is California Water Code, Section 40658:

"Business of district. The board shall manage and conduct the business of the district."

There are literally dozens of other statutes dealing with the powers of the board. See, e.g., the following:

"Acquisition and operation of works. The board may acquire, improve, and operate the necessary works for the storage and distribution of water, and any drainage or reclamation works connected therewith."<sup>50</sup>

"Disposal of water and water rights. The board may sell, distribute, or otherwise dispose of water and water rights not necessary for the uses and purposes of the district."<sup>51</sup>

"Permission to store water and use conduits. The board may grant to the owner or lessee of a right to the use of any water permission to store the water in any reservoir of the district or to carry it through any conduit of the district."<sup>52</sup>

"By-laws, rules and regulations for distribution and use of water. The board shall establish equitable by-laws, rules, and regulations for the distribution and use of water within the district. The by-laws, rules, and regulations shall recognize and shall be subject to such priorities in the right to

<sup>50</sup> Calif. Water Code, § 43000.

<sup>51</sup> Calif. Water Code, § 43001.

<sup>52</sup> Calif. Water Code, § 43002.

water between the different consumers of the water as may legally exist." <sup>53</sup>

"Contracts. The board may enter into any agreement with the United States or with any state, county, district, public corporation, or municipality of any kind, for a purpose appertaining to or beneficial to the project of the district, and it may do, any acts necessary or proper for the performance of the agreement." <sup>54</sup>

4. The argument that this suit seeks to take control from the landowners and vest it in the residents alone

"In essence, appellants' action seeks to take the management of District affairs away from the 307 landowners who own its 193,000 acres, are subject to the jurisdiction and governing power of the District, and give this control to the registered voters among the 77 men, women and children who live in the District who are not subject of its powers. Of these 77, only members of one family own land within the District." <sup>55</sup>

The first difficulty with this statement is that the landowners as a body do not govern the district. It is governed by the board of directors.<sup>56</sup> The function of the landowners is to elect the board. The Code provides for general elections, which are to be held "on the first Tuesday in February in each odd-numbered

<sup>53</sup> Calif. Water Code, § 43003.

<sup>54</sup> Calif. Water Code, § 43151. See also §§ 43025, 43026, 43150, 43152, 43153, 43154, 43161, 43304, 43305, 43500, 43501, 43504, 43506, 43507, 43530, 43533, 43555, and 44003. There are many others.

<sup>55</sup> Brief of Irrigation Districts Association of California, page 1.

<sup>56</sup> Calif. Water Code, § 40658.

year. . . ."<sup>57</sup> The defendant district may not have been intentionally amusing in its brief:

"One good test of an electoral system is how it works in actual operation."<sup>58</sup>

The way it works in actual operation is that there has not been a general election for a quarter of a century.<sup>59</sup> Under a voting system like the one enjoyed by this District, there is little motive for elections. The votes have already been counted, and the J. G. Boswell has 37,825 of them.

But to return to the claim that this action seeks to divest landowners of control, the prayer of the complaint is instructive:

"4. Require defendant Tulare Lake Basin Water Storage District to submit a plan whereby all residents of Tulare Lake Basin Water Storage District will be allowed to vote, without regard to land ownership, or in the alternative, a plan whereby all residents, lessees, and landowners will be allowed to vote, whether or not such residents be landowners, whether or not such lessees be landowners, and whether or not such landowners be residents, but with provision that no resident, lessee or landowner shall in any event or circumstance have more than one vote, however small or however great his landholdings may be."<sup>60</sup>

This case does not seek to deny landowners the franchise. It is primarily concerned with equality of the franchise as among landowners, and the granting of the ballot to lessees and residents.

<sup>57</sup> California Water Code, § 41300.

<sup>58</sup> District's Brief, page 27.

<sup>59</sup> Appendix, page 60. The last general election was in 1947.

<sup>60</sup> Appendix, page 15.



**5. The argument that *Schindler v. Palo Verde Irrigation District* represents the view of the California courts.**

The district bases some considerable reliance on *Schindler v. Palo Verde Irrigation District*,<sup>61</sup> and after quoting from the case says:

"Other states agree with California."<sup>62</sup>

The implication is that *Schindler* is a definitive and recent expression of the view of the California courts. It is not. It is a 1969 intermediate appellate court decision which the California Supreme Court has cast doubt upon in decisions in both 1971 and 1972. *Burrey v. Embarcadero Municipal Improvement District*;<sup>63</sup> *Curtis v. Board of Supervisors of Los Angeles County*.<sup>64</sup> The latter case was decided on September 19th. In *Burrey* the California Supreme Court struck down a statute granting the franchise only to landowners and giving "one vote for each one dollar (\$1) in assessed valuation of land owned by him . . . ." In *Curtis* that court has now ruled invalid a California statute<sup>65</sup> which provided that the filing of protests representing fifty one percent of the total assessed valuation of land within the boundaries of a proposed new city would prevent the calling of an election on the proposal. The defenders of that scheme relied upon *Schindler*.<sup>66</sup> The California Supreme Court stated as follows:

"In *Burrey v. Embarcadero Mun. Improvement Dist.* (1971) 5 Cal.3d 671, 682, fn. 8 [97 Cal.Rptr.

<sup>61</sup> 1 Cal. App. 3rd 831 (1969).

<sup>62</sup> District's Brief, pp. 14, 15.

<sup>63</sup> 5 Cal. 3rd 671 (1971).

<sup>64</sup> 7 Cal. 3rd 942 (1972).

<sup>65</sup> California Government Code, § 34311.

<sup>66</sup> 7 Cal. 3rd at 958.

203, 488 P.2d 395], we noted that *Schindler v. Palo Verde Irrigation Dist.* "may be difficult to reconcile with the Supreme Court cases on this subject, particularly *Kolodziejski*, which was decided after *Schindler*. (See *Girth v. Thompson* (1970) 11 Cal. App.3d 325, 330 [89 Cal.Rptr. 823].)" We concluded, however, that "since irrigation districts are substantially different from the EMID—their powers are fewer and more limited to the particular purpose for which the districts were created—we do not reach that question here."

"The applicability of the one-man, one-vote rule to special districts is presently before the Supreme Court in the case of *Associated Enter., Inc. v. Toltec Watershed Imp. Dist.* (Wyo. 1971) 490 P.2d 1069, prob. juris. noted, (1972) — U.S. — [32 L.Ed.2d 681, — S.Ct. —].) The Wyoming Supreme Court in this case had held that an election to establish a watershed district could be limited to landowners because the activities of the district were primarily proprietary instead of governmental."<sup>67</sup>

6. The argument that the weighted voting system should be upheld on analogy to profit corporations.

"We see the same voting procedure in profit corporations throughout the United States, and it has not been determined unreasonable that a person with a large investment should not have a larger voice in management than a person with a smaller one."<sup>68</sup>

But the plight of a small landowner in the defendant district is worse than that of a small stockholder in a California corporation. The latter can cumulate his votes to achieve some minority representation.<sup>69</sup> No

<sup>67</sup> 7 Cal. 3rd at 958, 959.

<sup>68</sup> Brief of Irrigation Districts Association, page 28.

<sup>69</sup> Calif. Corporations Code, § 2235.

such privilege is accorded the small landowner by the Water Storage District Law.<sup>70</sup> And what private corporation has the power of eminent domain, the power to assess land, the power to issue bonds which are liens on such land, governmental immunity from lawsuits, the right to file validation proceedings,<sup>71</sup> and the right to intervene in litigation as *parens patriae*? What private corporation has all the waters and water rights belonging to the state within its area given, dedicated and set apart for its uses and purposes?<sup>72</sup> What private corporation could be correctly described by California's Attorney General as one of that state's political subdivisions?<sup>73</sup>

**7. The argument that only the landed support the district.**

"Not only are the costs of Appellee District's operation borne solely by the property benefited, but the services performed by the district are also property-oriented."<sup>74</sup>

The suggestion that the landless should be excluded because only the landed pay the bills will not withstand analysis. Since 1969 the defendant district has received \$234,512.24 from the Federal government, pursuant to an application in which the defendant described itself as a political subdivision of the State of California.<sup>75</sup>

<sup>70</sup> The plaintiff landowner in *Schindler v. Palo Verde Irrigation District*, 1 Cal. App. 3rd 831 (1969), sought such a right to cumulate, but was not successful.

<sup>71</sup> Calif. Water Code, § 43730.

<sup>72</sup> Calif. Water Code, § 43158.

<sup>73</sup> Appendix, pp. 61, 17.

<sup>74</sup> Brief of California Central Valleys Flood Control Association, p. 6.

<sup>75</sup> Appendix, p. 61.

The residents of the district, whether landowners or not, are American citizens, and their share of that \$234,512.24 is as great as anyone else's. Their taxes contributed to it, and their Government gave it to the district, which nevertheless denies them the right to vote.

**8. The argument that none of the district's functions are of importance to residents.**

"It is apparent that these districts are not set up to serve people but to serve land."<sup>76</sup>

"No people-oriented services are involved."<sup>77</sup>

"The Appellee District was formed for the purpose of serving property not people; it in fact serves property not the people."<sup>78</sup>

From the inception of the Water Storage District Law in 1921, it has been recognized that one of its purposes was flood control. This is in no way surprising; the average California water organization seeks water in time of drought and fights it in time of flood. We accordingly find specific reference to flood control in the policy declarations of the California Water Storage district Law:<sup>79</sup>

"It is hereby declared that the state of California has a paramount interest in the storage, conservation and diversion of water, *the prevention of floods*, the irrigation, drainage, and reclamation of land and the production of electric energy; and that such storage, conversation, diversion, irri-

<sup>76</sup> Brief of California Central Valleys Flood Control Association, p. 4.

<sup>77</sup> Id. at p. 6.

<sup>78</sup> Id. at p. 7.

<sup>79</sup> Calif. Stats. 1921, c. 914, p. 1727.

gation, *prevention of floods*, reclamation, drainage, and production of electric energy will make productive vast quantities of land that are comparatively unproductive and will increase production, property valuations, and population in the state, make profitable the cultivation of small tracts and promote subdivision of larger tracts, and will promote the welfare and prosperity of all the people. The powers herein conferred upon the state engineer and board of directors are hereby declared to be police and regulatory powers and are *necessary to the accomplishment of a purpose that is indispensable to the public interests*, and the water storage districts hereunder provided to be formed are districts of the nature of irrigation, reclamation, or drainage districts in respect to all matters contemplated in the provisions of the Constitution of the state of California relating to irrigation, reclamation, or drainage."<sup>80</sup>

The Water Storage District Law was taken into the Water Code in 1951,<sup>81</sup> but reference to flood control continued to be express. See, e.g., Section 44001:

"The cooperation and contract may be for any or all of the following purposes: (a) Construction, acquisition, purchase, extension, operation or maintenance of works for irrigation, drainage, storage, *flood control*, generation and distribution of hydroelectric energy incidental thereto, or any of these."

Shortly after passage of the California Water Storage District Law, litigation was filed to determine its validity, and the Supreme Court of California in 1923 handed down its decision in the case of *Tarpey v. McClure*,<sup>82</sup> which remains the leading case on water stor-

<sup>80</sup> Calif. Stats. 1921, c. 914, § 58, p. 1766.

<sup>81</sup> Calif. Water Code, § 39000 ff.

<sup>82</sup> 190 Cal. 593, 213 Pac. 983 (1923).

age districts. The references in *Tarpey v. McClure* to the flood control purposes of the district are again express, as is the holding, by a court with a long experience in California water problems, that flood control and irrigation are but opposite sides of the same coin:

"It is urged that the act violates the provisions of section 24, art. 4, of the Constitution, in that it embraces more than one subject. It would be impracticable to attempt here to set forth even an outline of its comprehensive provisions. It must suffice to say that it provides for the organization, operation, maintenance, and government of water storage districts; for the acquisition by various means, and the storage, conservation, and distribution of water for irrigation, and for drainage and reclamation connected therewith; and for the generation and disposition of hydro-electric energy developed incidental thereto. It also provides for the repeal of the California Irrigation Act of 1915 and all acts amendatory thereof. *The conservation of water by means of flood control works to restrain flood waters which otherwise would overflow the land and go to waste, and, incident thereto, the reclaiming of the lands which otherwise would be overflowed and rendered useless, the storage and distribution of such water for purposes of irrigation, and, incident thereto, the generation and use of a hydro-electric energy as a by-product of such storage and distribution, all seems to us to be so legitimately and intimately connected one with another as not to constitute different subjects within the purview of the Constitution. It may be said that in these respects the act has but a single object, to wit, the better control and utilization of water, or stated differently, the reclamation and use of waste water, and, incident thereto, the reclamation and use of waste land.*"<sup>33</sup>

<sup>33</sup> 213 Pac. at 986.



The district has made an express concession of its flood control powers in this litigation. In its printed trial brief filed June 10, 1971 the district described itself as "an agency authorized by the law of California to engage in the reclamation of wasteland through *flood protection*, drainage and irrigation works."<sup>84</sup> The importance of the district's flood control powers, and its relevance to the present issue, is that the district and the amici curiae now argue that it exists only to serve land, that it is not "people-oriented", and that its residents are not interested in or affected by its services. But there are few things of greater interest to a man than whether his dwelling, and that of his family, is going to be inundated.<sup>85</sup>

From its inception in 1926 until 1969 the district carried on numerous flood control activities. Plaintiff's Exhibit 5 received in evidence in the court below is a letter dated September 23, 1953 from the president of the district to the California State Engineer. This letter was not printed in the appendix, but it is in the record, and the report on the district's flood control

<sup>84</sup> Trial Brief of defendant, p. 1.

<sup>85</sup> During the 1969 flood water in Tulare Lake Basin rose to a height of 192.5 U.S.G.S. datum, with 88,000 acres in the district flooded. [Appendix, page 40]. A comparison of Exhibit P, the map showing the location of the homes in the district, and Exhibit 2, a topographical map of Tulare Lake Basin (both of which have been reproduced in the Appendix following page 66), will show that the appellant Lawrence Ellison's residence in Section 19 was at 177 U.S.G.S. datum, or 15 1/2 feet below the water level at the crest of the 1969 flood. Had the North Central Levee broken it is quite possible that a number of people would have been drowned; and these appellants respectfully submit that such persons would have been both interested in and affected by such a development.

activities for the years from 1938 to 1953 is many pages in length.<sup>86</sup>

Four rivers enter Tulare Lake Basin, the Kings, the Kern, the Tule, and the Kaweah.<sup>87</sup> The relationship between the Kern River and Tulare Lake Basin is shown on plaintiff's Exhibit 4, which has been reproduced in the Appendix, following page 66. Exhibit 4 also shows the location of Buena Vista Lake, which is in Kern County, south of Tulare Lake Basin.

The most important floods of the twentieth century were in 1906, 1917, 1937-38, 1952, and 1969.<sup>88</sup> The 1952 flood affords a prime example of the district's exercise of its flood control jurisdiction. The minutes of a meeting of the Board of Directors on April 1, 1952 state in part as follows:

"Consulting Engineer Harding, in respect of conditions on Kern River during the current season, discussed with the Directors the protection that might be had against floods from that stream by the full use of Buena Vista Lake reservoir. He said that he understood the landowners in that area were planning to store considerable water in Buena Vista Lake and not to use the Lake area in 1952, for farming. He thought that Tulare Lake Basin Water Storage District should keep watch on what was done there, to see that Buena Vista Lake was fully used to store water from Kern River, because under normal, natural conditions

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<sup>86</sup> These references are available in the present record in a convenient form, in that they were excerpted and printed in the plaintiff's trial brief, running from page 43 to page 52 and that trial brief is in the record. These references are not being reprinted in the present brief because of their length.

<sup>87</sup> Appendix, p. 39.

<sup>88</sup> Appendix, pp. 39-41.

on Kern River a great deal of flood water from that River would flow into Buena Vista Lake. Finally, Director Stone moved and Director Salyer seconded the motion, and the motion carried unanimously for the adoption of a resolution as follows:

### "RESOLUTION

"RESOLVED: That the Engineers of Tulare Lake Basin Water Storage District be and they are hereby instructed to keep a careful watch on flood flows in Kern River during the current season to see that Buena Vista Lake takes the full amount of water which properly should flow into it and there be stored and that, if such storage does not appear to be taking place, the President of the District be and he is hereby authorized to write a letter in the name of Tulare Lake Basin Water Storage District, to Buena Vista Water Storage District and to the owners of land in Buena Vista Lake informing them that Tulare Lake Basin Water Storage District and the owners of land within it insist that such storage of flood flows of Kern River shall be made in Buena Vista Lake and that if they are not made the responsible parties will be held liable for any damages which may arise in Tulare Lake Basin by the discharge into such Basin of waters which should have been stored in Buena Vista Lake."<sup>89</sup>

Pursuant to the resolution of April 1, 1952, Tulare Lake Basin Water Storage District gave Buena Vista Water Storage District and the owners of land in Buena Vista Lake written notice in accordance with the resolution above quoted, and the notices were acquiesced in by those receiving them. Buena Vista Lake was filled with the flood waters of the Kern River in 1952.<sup>90</sup>

<sup>89</sup> Appendix, pp. 41, 42.

<sup>90</sup> Appendix, p. 43.

The relevance of the District's flood control powers and activities to the present case involves the flood of 1969. That flood was the greatest in the area since the legendary flood of 1906. Despite the dams on the Kings, Kern, Tule and Kaweah Rivers over a million acre feet of water entered Tulare Lake, and some 88,000 of the 193,000 acres in the District were flooded.<sup>91</sup> Three reclamation districts, much smaller units lying within the boundaries of Tulare Lake Basin Water Storage District, petitioned the District to call upon the interests controlling Buena Vista Lake to accept its proper share of this flood water, as had been done in the flood of 1952.<sup>92</sup> Historically the waters of extraordinary floods on the Kern River have first gone into Buena Vista Lake. After a trial which consumed years, with an intensive investigation of San Joaquin Valley geology reflected in some 30,000 pages of trial transcript, the Court in *Rank v. Krug*<sup>93</sup> stated as follows:

"Buena Vista Lake is the sink for the Kern River, and Tulare Lake is the sink for all the others..."<sup>94</sup>

Keeping as much flood water as possible out of Tulare Lake Basin Water Storage District was of com-

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<sup>91</sup> Appendix, p. 40.

<sup>92</sup> Appendix, pp. 43-47. The location of these reclamation districts, Consolidated R.D. No. 812, North Central R.D. No. 2071, and Wilbur R.D. No. 825, is shown on Plaintiff's Exhibit 3, which has been reproduced in the Appendix following p. 66.

<sup>93</sup> 142 F.Supp. 1 (S.D. Cal. 1956), reversed on other grounds 372 U.S. 609 (1963)

<sup>94</sup> 142 F.Supp. at 44.

elling interest to every landowner in the District, and to every man, woman and child therein, irrespective of landholding. But the weighted system of landowner voting made it possible for the six J. G. Boswell Company stockholders and employees on the Board of Directors to table a motion that the appropriate notices be given to the Buena Vista Lake interests on March 4, 1969. The minutes of that meeting are in the record as plaintiff's Exhibit 6.<sup>95</sup>

Erling Kloster, Esq., appeared at the District meeting on March 4, 1969 for the J. G. Boswell Company, and the language of the minutes is a succinct description of what happened then:

"Attorney Kloster at this point made disclosures for the record as to the association of six of the directors with the J. G. Boswell Company indicating in some detail their stock ownerships and employee affiliations. The six directors were Armor, Barnes, Evers, Fisher, Robinson and Vandergriff. He stated further that he had advised these directors they were not disqualified to vote with reference to the Buena Vista matter."<sup>96</sup>

By virtue of the six Boswell votes, the motion made at that meeting to place the Buena Vista Lake interests on notice, and if necessary to proceed for injunctive relief, was tabled on a 6-4 vote, with each non-Boswell director voting against the motion to table. These included Ceil Howe, president of Westlake Farms, Edwin E. Anderson, Jr., an officer of South Lake Farms and Producers Cotton Oil Com-

<sup>95</sup> Appendix, p. 48.

<sup>96</sup> Appendix, p. 48.

pany, and plaintiffs C. Everette Salyer and Fred Salyer.<sup>97</sup>

No notice was given by the District to the Buena Vista Lake interests, and for the first time in history Cell 3 of Buena Vista Lake, which comprises approximately 70 percent of its area and 85 percent of its storage capacity, received no waters from the Kern River in a flood year. The capacity of Buena Vista Lake is approximately 235,000 acre feet. This water entered Tulare Lake Basin in 1969 and added to the flood conditions already there.<sup>98</sup>

It may be asked why the Boswell directors took a position so contrary to the position taken by Tulare Lake Basin Water Storage District in the 1952 flood. The answer is that in 1969, unlike 1952, the J. G.

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<sup>97</sup> The ostensible reason given by the Boswell directors was an opinion by James G. McCain, Esq., counsel for the district, that the district had no legal power to engage in flood control activities or litigation. [See Plaintiffs Exhibit 6]. Mr. McCain is an able lawyer, but his opinion is subject to the comment that he is himself a Boswell attorney and stockholder. It will be observed from an inspection of Exhibit 5, the district letter of September 23, 1953, outlining fifteen years of flood control activities, that Mr. McCain was a member of the Board of Directors at the time that letter was prepared. He does not appear to have objected to the flood control activities of the district then engaged in. The power of the district to litigate is spelled out in Water Code, § 43700:

“A district may commence and maintain any actions and proceedings to carry out its purposes or protect its interests and may defend in any action or proceedings brought against it.”

Mr. McCain was also a member of the 1952 Board which gave notice to the Buena Vista Lake interests in the flood of that year. Directors Robinson and Armor were also members in 1952. [Appendix, p. 42]

<sup>98</sup> Appendix, pp. 40, 49.



Boswell Company was in possession of Buena Vista Lake under a long term agricultural lease."<sup>99</sup>

The Buena Vista Lake controversy was discussed in appellants' opening brief.<sup>100</sup> It has been studiously ignored in the briefs of the district and the amici curiae. There is a great deal of talk in those briefs about how it is necessary to preserve weighted voting in the interest of the landowners. Weighted voting did not preserve the interest of the landowners of Tulare Lake Basin in 1969. And the interest of the residents in the safety of their homes and persons was simply ignored.

### CONCLUSION

In the opening brief these appellants suggested that the situation of Plaintiff Lawrence Ellison, the non-landowning resident of the District who is a voter and has long been interested in water problems, cannot be distinguished from the non-landowning bachelor who was interested in education, in *Kramer v. United Free School District*.<sup>101</sup> It is respectfully submitted that under the ruling in *Kramer*, Ellison should be permitted to vote.

The electorate, when selected, should have an equal franchise. The spectre the District envisions of abuses by multiplication of leases and multiplication of ownerships, should not deter overthrow of the present system. It is most unlikely that such abuses would take place, and in any event the case must be decided

<sup>99</sup> Appendix, p. 43.

<sup>100</sup> Appellants' Brief, pp. 14-16.

<sup>101</sup> 395 U.S. 621 (1969).

on the record as it presently exists. The evidence of present abuse is real enough, and the question is whether a system such as that which obtains in Tulare Lake Basin Water Storage District can be tolerated any longer. Although Article IV, Section 4 of the Constitution, guaranteeing to "every State in this Union a Republican Form of Government" has been held not to be for judicial enforcement,<sup>102</sup> the clause at least shows us that the Framers had in mind. The ultimate question in this case is whether the president of the District will in the future be able to repeat to a public body what he said to the California Districts Securities Commission in 1967:

"MR. ROBINSON: I know you shouldn't forecast elections and that causes me a little hesitancy to say what I am going to say.

*"The eleven divisions in this large farming operation are completely controlled. You are going to have the same eleven directors on Tuesday that you have got today—with one exception. One of the directors is having some health trouble and he is going to be replaced; but other than that, they are going to be the same eleven directors."*

\* \* \*

"MR. ROBINSON: Well, *I have no concern about the election.*

*"But suddenly if a new board of directors were to come in, why then I would have nothing but opinion. But I have no concern about the election. The eleven divisions are controlled by people with enough votes to put back the same directors they have now—including the two Salyers that are dissenting at this time. They will be returned; the other nine will be returned."*<sup>103</sup>

<sup>102</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>103</sup> Appendix, pp. 61, 62.

It is respectfully submitted that that portion of the judgment below which was appealed from should be reversed, and sections 41000 & 41001 of the California Water Code be held unconstitutional.

C. RAY ROBINSON,  
THOMAS KEISTER GREER,  
*Counsel for Appellants.*

December, 1972